UNP Plywood Sdn Bhd v HSBC Bank Malaysia Bhd

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO S-02–47 OF 2007
MOKHTAR SIDIN, MOHD GHAZALI AND TENGKU BAHARUDIN SHAH JJCA
3 DECEMBER 2009

Civil Procedure — Summary judgment — Appeal — Triable issues — Cancellation of foreign exchange contracts by bank and claim for losses — Whether bank estopped from cancelling foreign exchange contracts before expiry of agreed extension period — Whether triable issue shown in relation to issue of estoppel

Civil Procedure — Summary judgment — Banking — Cancellation of foreign exchange contracts by bank and claim for losses — Whether bank estopped from cancelling foreign exchange contracts before expiry of agreed extension period — Whether triable issues shown

Contract — Estoppel — Estoppel by conduct — Cancellation of foreign exchange contracts by bank and claim for losses — Extension of time granted by bank for customer to comply with requirements failing which foreign exchange contracts would be cancelled — Whether bank estopped from cancelling foreign exchange contracts before expiry of agreed extension period

The plaintiff was a local bank and the defendant was the plaintiff's customer. The plaintiff had granted the defendant banking facilities by way of 'Export Line' and 'Foreign Exchange Line' which were repayable on demand. The defendant failed to provide any concrete or firm export trade commitments and consequently the plaintiff cancelled all the outstanding foreign exchange contracts on 23 July 1998 and at the same time cancelled the foreign exchange line facility. The plaintiff claimed that as a consequence of the cancellation of the outstanding foreign exchange contracts, it had suffered 'marked to market' losses in the sum of RM7,506,868.06. The plaintiff sued claiming this sum together with an unauthorised overdraft sum of RM20,249.73. The defendant averred that the plaintiff had by letter dated 15 July 1998 agreed to give the defendant a further extension of six months to the said foreign exchange contracts on condition of a corporate guarantee being given by Mycom Bhd for RM1.9m to the plaintiff and in that respect the plaintiff granted the defendant a period of time ending on 16 August 1998 to return the said corporate guarantee duly executed by Mycom Bhd

failing which the plaintiff would then exercise its alleged overriding rights of repayment on demand to cancel the said foreign exchange contracts. The defendant claimed that by purporting to exercise its alleged overriding right of repayment on demand and in cancelling the foreign exchange contracts prior to 17 August 1998, the plaintiff had wrongfully reneged on its promise as contained in the said letter. Premised upon the said letter, the defendant contended that the plaintiff was estopped from exercising or claiming that it was entitled to exercise its alleged right to cancel the said foreign exchange contracts on 23 July 1998. The plaintiff's application to enter summary judgment against the defendant was dismissed by the learned deputy registrar of the High Court but was allowed on appeal to the judge in chambers. Hence this appeal.

Held, allowing the appeal with costs:

(1) Summary judgment procedure is a procedural device available for prompt and expeditious disposition of an action by a plaintiff or a counterclaim by a defendant, without a trial when there is no dispute as to the fact and law. The main issues raised by the defendant were with regards to the illegality of the said foreign exchange contracts, estoppel and that the plaintiff did not suffer any damages. With regards to the issue of estoppel, this was not a suitable case for summary judgment to be entered. The triability of this issue depended upon evidence as opposed to law (see paras 35, 37–38).

(2) The defence of estoppel revolved around the plaintiff's letter dated 15 July 1998 wherein the plaintiff agreed to give to the defendant a further six months extension to the said foreign exchange contracts on condition of a corporate guarantee being given by Mycom Bhd for RM1.9m to the plaintiff within one month from the date of that letter. Thus the defendant was given until 16 August 1998 to furnish the said corporate guarantee failing which the plaintiff would exercise its overriding right of repayment on demand and to cancel the said foreign exchange contracts. However, the plaintiff cancelled the said foreign exchange contracts on 23 July 1998 although the defendant had until 16 August 1998 to provide the said corporate guarantee. Whether the plaintiff had the right to cancel the said foreign exchange contracts prior to 16 August 1998 was a triable issue (see paras 40 & 44).

[Bahasa Malaysia summary

Plaintif merupakan sebuah bank tempatan dan defendan merupakan pelanggan plaintif. Plaintif telah memberikan kemudahan perbankan kepada defendan melalui 'Export Line' dan 'Foreign Exchange Line' yang mana hendaklah dibayar apabila dituntut. Defendan gagal untuk menyediakan sebarang komitmen perdagangan eksport yang konkrit atau kukuh dan dengan itu, plaintif membatalkan kesemua kontrak pertukaran asing yang

A belum selesai pada 23 Julai 1998 dan pada masa yang sama membatalkan kemudahan 'Foreign Exchange Line' tersebut. Plaintif berhujah bahawa disebabkan pembatalan kontrak-kontrak pertukaran asing yang belum selesai, ia telah mengalami kerugian 'marked to market' berjumlah RM7,506,868.06. Plaintif telah menyaman menuntut jumlah tersebut bersama overdraf yang B tidak diluluskan berjumlah RM20,294.73. Defendan menegaskan bahawa plaintif telah melalui sepucuk surat bertarikh 15 Julai 1998 bersetuju untuk memberikan defendan tempoh lanjutan selama enam bulan terhadap kontrak-kontrak pertukaran asing tersebut dengan syarat satu jaminan korporat diberikan oleh Mycom Bhd untuk RM1.9 juta kepada plaintif dan C berikutan itu plaintif telah memberikan defendan tempoh masa sehingga 16 Ogos 1998 untuk memulangkan jaminan korporat yang ditandatangani oleh Mycom Bhd dan sekiranya gagal, plaintif akan melaksanakan hak-hak bayaran balik atas tuntutan yang dikatakan penting untuk membatalkan kontrak-kontrak pertukaran asing. Defendan berhujah bahawa dengan D mengatakan ia akan melaksanakan hak-hak bayaran balik atas tuntutan yang dikatakan penting dan membatalkan kontrak-kontrak pertukaran asing sebelum 17 Ogos 1998, plaintif dengan salahnya telah memungkiri janji seperti yang terkandung dalam surat tersebut. Dengan berpremiskan kepada surat tersebut, defendan menegaskan bahawa plaintif diestop daripada E melaksanakan atau menuntut bahawa ia berhak melaksanakan hak untuk membatalkan kontrak-kontrak pertukaran asing pada 23 Julai 1998. Permohonan plaintif untuk memasukkan penghakiman terus terhadap defendan telah ditolak oleh timbalan pendaftar Mahkamah Tinggi yang bijaksana tetapi membenarkan rayuan kepada hakim dalam kamar. Maka F rayuan ini.

Diputuskan, membenarkan rayuan dengan kos:

(1) Prosedur penghakiman terus adalah cara prosedur yang didapati untuk pelupusan segera dan cepat bagi tindakan oleh plaintif atau tuntutan G balas oleh defendan tanpa perbicaraan apabila tidak terdapat pertikaian fakta dan undang-undang. Isu-isu utama yang dibangkitkan oleh defendan adalah berkaitan dengan kepenyalahan undang-undang kontrak-kontrak pertukaran asing tersebut, estopel dan bahawa plaintif H tidak mengalami sebarang kerugian. Berkenaan dengan isu estopel, ini bukanlah kes yang bersesuaian untuk memasukkan penghakiman terus. Sama ada isu ini boleh dibicarakan bergantung kepada keterangan dan bukan undang-undang (lihat perenggan 35, 37–38).

(2) Pembelaan estopel berkisar pada surat plaintif bertarikh 15 Julai 1998 I di mana plaintif bersetuju memberikan defendan tempoh lanjutan selama enam bulan untuk kontrak-kontrak pertukaran asing tersebut dengan syarat jaminan korporat diberikan oleh Mycom Bhd untuk RM1.9 juta kepada plaintif dalam tempoh satu bulan dari tarikh surat tersebut. Oleh itu, defendan telah diberikan sehingga 16 Ogos 1998

untuk memberikan jaminan korporat tersebut dan sekiranya gagal, plaintif akan melaksanakan hak bayaran balik atas tuntutan yang penting dan membatalkan kontrak-kontrak pertukaran asing tersebut. Walau bagaimanapun, plaintif membatalkan kontrak-kontrak pertukaran asing tersebut pada 23 Julai 1998 meskipun defendan telah memberikan jaminan korporat tersebut sehingga 16 Ogos 1998. Sama ada plaintif mempunyai hak untuk membatalkan kontrak-kontrak pertukaran asing tersebut sebelum 16 Ogos 1998 merupakan isu yang boleh dibicarakan (see paras 40 & 44).]

Notes

For cases on appeal, see 2(1) *Mallal's Digest* (4th Ed, 2007 Reissue) paras 6883–7049.

For cases on banking, see 2(1) *Mallal's Digest* (4th Ed, 2007 Reissue) paras 7119–7121.

For cases on estoppel by conduct, see 3(2) *Mallal's Digest* (4th Ed, 2010 Reissue) paras 3639–3652.

Cases referred to

Bank Negara Malaysia v Mohd Ismail & Ors [1992] 1 MLJ 400, SC (refd)

Boustead Trading (1985) Sdn Bhd v Arab-Malaysian Merchant Bank Bhd [1995] 3 MLJ 331; [1995] 4 CLJ 283, FC (refd)

Ng Hee Thoong & Anor v Public Bank Bhd [1995] 1 MLJ 281, CA; [1995] 1 AMR 622 (refd)

Syarikat Kerjasama Serbaguna Tunas Muda Sungai Ara v Ghazali bin Ibrahim [1985] 2 MLJ 225, HC (refd)

United Overseas Bank (M) Bhd v Island Palm Trader Sdn Bhd [2000] MLJU 659; [2000] 8 CLJ 647, HC (refd)

Legislation referred to

Banking and Financial Institutions Act 1989 s 62
Contracts Act 1950 s 63
Exchange Control Act 1953

Appeal from: Suit No K 22–53 of 1999 (High Court, Kota Kinabalu)

Francis Chia Kee Tat (Chin Yuen Fong with him) (Chin Lau Wong & Foo) for the appellant/defendant.
Christopher KH Chong (Lind, Willie, Wong & Chin) for the respondent/plaintiff.

Mohd Ghazali JCA (delivering judgment of the court):

[1] The plaintiff is a local bank. The defendant, a locally incorporated company, is the plaintiff's customer who maintained an account with the

plaintiff at the material time. The plaintiff filed an action against the defendant claiming that it had suffered loss in the sum of RM7,527,117.79 arising from two banking facilities that were granted to the defendant. The plaintiff's application to enter summary judgment against the defendant was dismissed by the learned deputy registrar of the High Court but was allowed on appeal to the judge in chambers.

[2] The defendant appealed to this court. We allowed the appeal with costs and set aside all orders made by the learned judge and ordered that the matter go for trial. Our reasons for allowing the appeal are as follows.

THE FACTS

[3] By letter of offer dated 20 December 1994 the plaintiff granted the defendant two banking facilities by way of 'Export Line' and 'Foreign Exchange Line' ('the said banking facilities') up to a total limit of RM10m each which were repayable on demand and subject to the terms and conditions contained therein. It was expressly provided:

(a) that the purpose of the export line is for the negotiation of bills under 'Sight Documentary Credits';

(b) that the foreign exchange line is to fix forward contracts up to 12 months; and

(c) that the plaintiff reserved its right to recall the said banking facilities if the defendant did not use it for the specific purposes that they were granted.

[4] The express terms of the letter of offer included the following:

(a) that the said banking facilities were subject to review from time to time by the plaintiff;

(b) that the plaintiff shall have the overriding right to close out any or all foreign exchange contracts outstanding at any time without reference to the defendant and to demand settlement of the balance due to the plaintiff;

(c) that the plaintiff reserve its overriding right to call for cash cover on demand and/or to close out any or all foreign exchange contracts outstanding at any time, without further reference to the defendant and to demand settlement of the balance due to them; and

(d) that the acceptance of the said banking facilities will not contravene s 62 of the Banking and Financial Institutions Act 1989 and ECM 8 of

the Exchange Control Act 1959 and that at least 60% of the plaintiff's short term trade financing are extended by Malaysian owned financial institutions.

SUBSEQUENT LETTERS OF OFFER

[5] Subsequently by letters of offer dated 22 November 1995, 6 December 1996, 24 September 1997 and 24 November 1997 respectively the plaintiff reviewed and offered a renewal of the said banking facilities to the defendant which was accepted by the latter. It was an express term of these letters of offer that all the terms and conditions as agreed in the first letter of offer dated 20 December 1994 shall apply.

THE SECURITY AGREEMENT

[6] Meanwhile, by a 'General Security Agreement Relating to Goods' dated 24 February 1995 ('the security agreement') and as continuing security for the payment of any or all sums in which the defendant may from time to time be actually or contingently indebted or liable to the plaintiff under the said banking facilities, the defendant pledged and agreed to pledge all bills, documents of title, transportation documents, insurance policies and other documents representing or relating to such goods as financed under the said banking facilities and that such documents or goods shall not be subject to any lien, charge or other encumbrance in favour of any other person.

[7] It was an express term of the security agreement that the plaintiff may sell, dispose of or otherwise deal with any or all of the goods at their absolute discretion without notice or demand to any person in order to reimburse them in respect of the said banking facilities in the event of default as provided therein. Further, it was also a term of the security agreement that the defendant shall pay any deficiency to the plaintiff which may remain owing to the plaintiff after such sale or disposal of the goods.

[8] Subsequently by letter dated 9 March 1998 the defendant made a request to the plaintiff for an extension of the foreign exchange contracts for a further period of six months upon its respective maturity dates. Pursuant to this request, the plaintiff extended the foreign exchange contracts for another six months and hedged the foreign currency at US dollars of the respective foreign exchange contracts. The plaintiff averred that it had on various dates informed the defendant about the same and the defendant has signed and confirmed its acceptance.

[9] However, by letter dated 15 July 1998, ie, about four months later the plaintiff informed the defendant as follows:

(a) that it was not the plaintiff's practice to allow the extension of the

foreign exchange contracts facility — at that material time the outstanding sum was RM1,805,852.34 — without any firm trade and export commitments secured by the defendant despite of Bank Negara Malaysia's approval and that the plaintiff reserved its overriding rights to cancel the foreign exchange contracts; and

(b) that the defendant had to furnish a 'corporate guarantee' for the sum of RM1.9m as a collateral security to be provided by Mycom Bhd and that if the defendant failed to do so, it would exercise its overriding rights of repayment on demand, to cancel the foreign exchange contracts without further notice and claim for the 'marked to market' losses incurred thereby.

[10] The defendant failed to provide any concrete or firm export trade commitments and consequently the plaintiff cancelled all the outstanding foreign exchange contracts on 23 July 1998 and at the same time cancelled the said foreign exchange line facility.

[11] It is the plaintiff's claim that as a consequence of the cancellation of the outstanding foreign exchange contracts, it had suffered 'marked to market' losses in the sum of RM7,506,868.06.

[12] By letter dated 2 December 1998, the plaintiff's solicitors demanded from the defendant the repayment of the said sum of RM7,506,868.06 together with an unauthorised overdraft sum of RM20,249.73 with interest accruing on the said overdraft sum at the rate 4% above the plaintiff's base lending rate ('BLR') (currently at 9.05%pa), making a total sum of RM7,527,117.79 as at 18 September 1998 but met with no response.

THE SUIT

[13] Subsequently the plaintiff filed this action and claimed for the following:

(a) the sum of RM7,506,868.06;

(b) the sum of RM20,249.73;

(c) agreed interest on the said sum of RM20,249.73 at the rate of 13.05%pa (agreed rate of 4% above the plaintiff's BLR currently at 9.05%pa) on 19 September 1998 to the date of full payment;

(d) statutory interest on the said sum of RM7,506,868.06 from the date of the writ of summons to the date of judgment;

(e) statutory interest at the rate of 8%pa on the said sum of RM7,506,868.06 from the date of judgment to the date of full payment;

(f) the solicitors' fees on a solicitor and client basis;

(g) any other relief or order as this court deems fit; and

(h) costs to be taxed.

DEFENCE AND COUNTERCLAIM

[14] In its statement of defence, the defendant averred that the following forward foreign exchange contracts were entered into between the plaintiff and the defendant which contracts provided for delivery options exercisable during diverse pockets of time over an initial period of about six months but subsequently extended by the plaintiff for a further period of about six months, namely:

Date of Contract	Contract Serial No	Initial Last Option Date	Extended Last Option Date
3.9.1997	710296	4.3.1998	2.9.1998
4.9.1997	710403	7.3.1998	3.9.1998
17.9.1997	711070	18.3.1998	16.9.1998
22.9.1997	711339	19.3.1998	17.8.1998
23.9.1997	711405	22.3.1998	20.7.1998
11.10.1997	712696	13.4.1998	10.10.1998
13.10.1997	712703	1.4.1998	27.8.1998
17.10.1997	713047	20.4.1998	16.10.1998
6.11.1997	713961	9.5.1998	5.11.1998
20.11.1997	714585	23.5.1998	19.11.1998
21.7.1997	707832	22.9.1997	20.7.1998
22.9.1997	711341	19.3.1998	14.8.1998
29.9.1997	711686	27.3.1998	25.8.1998
2.12.1997	715219	5.6.1998	2.12.1998

[15] The defendant averred that it did request the plaintiff to extend the said foreign exchange contracts for a further period of six months upon its respective maturity dates and that the plaintiff agreed to such extension as laid down above.

[16] The defendant contended that the plaintiff is and was at all material times authorised to act as authorised dealer for the purposes of the Exchange Control Act 1953 in relation to all foreign currencies and is and was at all

material times obliged and required under the Exchange Control Act 1953 to comply with directions given by the Controller of Foreign Exchange. Such directions would include, inter alia, a direction set out in r 7 of ECM 6 of the relevant Exchange Control of Malaysia Notices ('ECM notices') applicable at the material time, namely, that an authorised bank may purchase foreign currency forward from residents of Malaysia against Malaysian dollars subject to the condition that before the foreign exchange contract is entered into, it must be established that the customer is due to receive foreign currency from a third party under a firm contractual commitment and that the forward purchase is for a sum not exceeding the amount which is contractually due ('the said direction'). In the event, the foreign exchange contracts were entered into by the plaintiff in breach of the said direction in that at all material times before and when they were entered into, the defendant was not due to receive foreign currency from a third party under a firm contractual commitment. The plaintiff neither established this requirement nor did it establish that the forward purchase was for a sum not exceeding the amount which was contractually due, if any.

[17] Based on the above premises, the defendant contended that the said foreign exchange contracts were and are illegal and void and as such the plaintiff's claim is unmaintainable against the defendant.

[18] Further or alternatively, the defendant contended that even if, which is denied, the said foreign exchange contracts are lawful, the plaintiff had, by purporting to cancel the said foreign exchange contracts on 23 July 1998, done so prematurely before the last date for exercising the option under the said foreign exchange contracts had expired and accordingly had wrongfully repudiated the same.

[19] The defendant averred that in law the alleged 'overriding right to close out any or all foreign exchange contracts outstanding' are either of no effect in so far as they are inconsistent with the provision as to the duration of the said foreign exchange contracts or the same are to be read subject to the provision as to the duration of the said foreign exchange contracts.

[20] The defendant then averred that the plaintiff did by letter to the defendant dated 15 July 1998 agree to give the defendant a further extension of six months to the said foreign exchange contracts on condition of a corporate guarantee being given by Mycom Bhd for RM1.9m to the plaintiff and in that respect the plaintiff granted the defendant a period of time ending on 16 August 1998 to return the said corporate guarantee duly executed by Mycom Bhd failing which the plaintiff would then exercise its alleged overriding rights of repayment on demand to cancel the said foreign exchange contracts. By purporting to exercise its alleged overriding right of repayment

on demand and in cancelling the said foreign exchange contracts prior to 17 August 1998, the plaintiff had wrongfully reneged on its promise as contained in the said letter. The plaintiff's letter to the defendant dated 15 July 1998 read, inter alia, as follows:

> Dear Sirs
>
> BANKING FACILITIES
>
> FOREIGN EXCHANGE CONTRACTS
>
> We refer to the above and the discussion with your Ms Alice Yong on the instant date.
>
> Based on Bank Negara Malaysia's letter dated 01 June 1998 where approval for the extension of your foreign exchange (FEX) contracts with us is given, subject to firm trade/exports commitments secured by you.
>
> We understand that you have no exports trading at this juncture and under this circumstances, we wish to stress that it is not the Bank's practice to allow extension of your FEX contracts (current outstanding of RM1,805,852.34) without any firm export deals despite BNM's approval and we reserve our overriding rights to cancel your contracts without further reference to you. However, after having discussed this matter we are exceptionally agreeable to allow 6 months extension of your contracts subject to Mycom Berhad's Corporate Guarantee for RM1,900,000 to be taken as collateral security. In this connection, we enclose herewith our standard guarantee form for the execution of Mycom Berhad's authorised signatories which please return to us as soon as possible.
>
> We hereby give you one (1) month period from the date of this letter to return the completed guarantee i.e. by 16 August 1998 to the Bank, failing which we shall exercise our customary overriding rights of repayment on demand to cancel your FEX contracts without further notice to you and convert the 'marked to market' losses to a term loan. We trust that this course of action need not prove necessary and shall be pleased to receive your urgent reply to this matter.

[21] Premised upon the letter referred to the above, the defendant contended that the plaintiff was estopped from exercising or claiming that it was entitled to exercise its alleged overriding right to cancel the said foreign exchange contracts on 23 July 1998 when it had by the said letter dated 15 July 1998 expressly stated that it gave the defendant one month from the date of the letter to return the completed guarantee, ie, by 16 August 1998.

[22] Under the above circumstances, the defendant believed and expected that the said foreign exchange contracts would be extended for a further period of six months in the event that the defendant returned the completed guarantee by Mycom Bhd on or before 16 August 1998 and that in the interim, viz, between 15 July 1998 and 16 August 1998, the said foreign exchange contracts would not be cancelled. As such, it is the contention of

the defendant that it was and is unjust, inequitable and unconscionable for the plaintiff to enforce its alleged overriding rights to cancel the said foreign exchange contracts on or before 16 August 1998. The defendant relied on the provisions of s 63 of the Contracts Act 1950 to this end.

[23] The defendant also counterclaimed for a sum of RM4,043.17 together with interest. The defendant averred that the plaintiff was indebted to the defendant for that sum as at 24 July 1998.

[24] In reply to the defence and counterclaim, the plaintiff contended, inter alia, as follows:

(a) that the said six months extension of the respective foreign exchange contracts were subject to the terms and conditions as stated in the respective 'Foreign Exchange Contracts Extension Advice' which were duly confirmed and accepted by the defendant;

(b) that the plaintiff reserved the right to close the contracts by selling/buying in for account of the defendant and that any differences arising therefrom should be payable forthwith notwithstanding that the day originally stipulated to settlement might not have arrived and for which the plaintiff was authorised to set off from or debit and/or combine consolidate any account(s) standing in the defendant's name;

(c) that the plaintiff had rightfully cancelled the respective foreign exchange contracts and that the plaintiff also had taken into consideration Bank Negara Malaysia's directives in cancelling the same;

(d) that the defendant later informed the plaintiff that the defendant did not have firm trade commitments or exports trading and which was contrary to the condition of Bank Negara Malaysia's approval which required the defendant to have firm trade commitments;

(e) that the defendant's major banker, namely, Sime Bank have imposed conditions and restrictions on the defendant's banking facilities in December 1997 leading to a complete freeze on the defendant's facilities in January 1998; and

(f) that the management of the defendant had decided to temporarily cease its operations from July 1998 for three months while waiting for the market to recover and such decision amounted to an event of default under the terms and conditions of the letters of offer.

[25] It is also the plaintiff's contention that it had lawfully and rightfully cancelled the respective foreign exchange contracts on 23 July 1998, inter alia, on the following grounds:

(a) the defendant could not secure any firm trade commitments;

(b) the defendant's decision to cease operations from July 1998; it was a condition in the letters of offer that it would constitute an event of default if the defendant shall cease or threaten to cease to carry on business;

(c) the defendant could not provide the corporate guarantee; the defendant had through its representative Ms Alice Yong on several occasions indicated to the plaintiff's representatives that it could not provide the corporate guarantee; and

(d) failed to comply with the Bank Negara Malaysia's directives.

[26] The plaintiff contended that the defendant's alleged expectations and the plea of estoppel are baseless and without merit whatsoever in view of the above events. It also contended that s 63 of the Contracts Act 1950 is not applicable and not relevant to the present proceedings.

[27] To conclude, the plaintiff insisted that it had complied with the banking practice and procedures in respect of its conducts in relation to the defendant's current account and that upon cancellation of the respective foreign exchange contracts whereby there was a 'marked to market' loss of RM7,506,868.06, it had lawfully and rightfully debited this amount into the defendant's current account on 24 July 1998. With regards to the counterclaim, the plaintiff denied that it was indebted to the defendant in the sum RM4,043.17

APPLICATION FOR SUMMARY JUDGMENT

[28] The plaintiff subsequently filed an application by way of summons in chambers praying for the following orders:

(a) that the plaintiff be at liberty to enter final judgment against the defendant for the following sums:

(i) the sum of RM7,506,868.06;

(ii) the sum of RM20,249.73;

(iii) agreed interest on the sum of RM20,249.73 at the rate of 13.05%pa (agreed rate of 4% above the plaintiff's BLR plus the plaintiff's BLR at 9.05%pa at the time of issuance of writ of summons) from 19 September 1998 to the date of full payment;

(iv) statutory interest at the rate of 8%pa on the sum of RM7,506,868.06 from the date of writ of summons to the date of judgment; and

(v) statutory interest at the rate of 8%pa on the sum of RM7,506.868.06 from the date of judgment to the date of full payment,

on the ground that the defendant did not have any defence to the plaintiff's claim; and

(b) that the defendant's amended counterclaim dated 12 August 1999 be struck out on the following grounds:

(i) that it is scandalous, frivolous and vexatious; and

(ii) further or in the alternative, that it is an abuse of process of the court, and

(c) that the costs of this application be borne by the defendant.

[29] The learned deputy registrar of the High Court dismissed the plaintiff's application to enter final judgment against the defendant and ordered that the defendant be given unconditional leave to defend the action. The plaintiff appealed to the judge in chambers who allowed the appeal with costs. The defendant appealed to this court.

JUDGMENT OF THE HIGH COURT JUDGE

[30] After summarising the facts as found in the pleadings, the learned judge said three issues were raised in the defence against the plaintiff's claim, namely:

(a) that the said foreign exchange contracts entered between the plaintiff and the defendant are illegal and that the plaintiff's claims are unsustainable;

(b) that the plaintiff is estopped from terminating the said foreign exchange contracts; and

(c) whether the plaintiff did indeed suffer any loss or damages at all.

[31] With regards to the first issue, viz, whether the said foreign exchange contracts entered between the plaintiff and the defendant are illegal and that the plaintiff's claims are unsustainable, the learned judge was of the view that 'the plaintiff had taken all necessary action to satisfy itself in compliance with the terms and requirements of the said paras 5.1 and 5.2 of ECM 2 (1/94)'. He then said:

I agree with the argument of learned counsel for the plaintiff that Bank Negara Malaysia had not in anyway formulated a requirement on how the plaintiff or any other bank should be satisfied that the non bank resident is due to receive foreign currency. The obvious fact is that the defendant is obliged under the terms of the forward foreign exchange contracts to confirm the receipt of foreign currency in future and that the sum to be received is not less than the sum contracted with the plaintiff.

In view of the above, I am of the considered view that the defendant's contention on illegally on issue No 1 cannot stand and should be dismissed in limine.

[32] On the second issue, viz, that the plaintiff is estopped from terminating the said foreign exchange contracts which is centered around the plaintiff's letter dated 15 July 1998, the learned judge was of the view that estoppel cannot arise. He said:

Having evaluated the facts presented on this issue, I have to agree with the plaintiff that it has acted rightly and in accordance with the terms and conditions of the contracts and with the directives from Bank Negara Malaysia in terminating all the 15 forward foreign exchange contracts with the defendant. It is obvious that the defendant's own failure to comply with the conditions and directives was the underlying reason for the termination of the contract. The plaintiff had taken all the necessary steps to assist the defendant and none of those acts would fit the description that estoppel should creep into this argument. It is therefore my view that the plaintiff should not be estopped from terminating the forward foreign exchange contracts.

[33] On the third issue, the learned judge was of the view that the defendant's contention that the plaintiff had not suffered any loss or damage is baseless and devoid of merit. He said:

The defendant argued that the plaintiff had not shown any documentation to show that it suffered loss and damages 'marked to market' losses amounting to RM7,506,868.06. The plaintiff instead exhibited true copies of the statements of account dated 31 July 1998 and 30 August 1998 at exhs ML17(a) and ML17(b) respectively of encl 18. The plaintiff also said that it has complied, with the banking practice and procedure in respect of its conducts in relation to the defendant's current account maintained with the plaintiff, see paras 25(i)–25(iii) of the affidavit in support of Melania Annol@Melanie at encl 18.

There is no evidence before this court provided by the defendant disputing the statement of account as produced by the plaintiff. The affidavit of the plaintiff at encl 18 showed to this court how the plaintiff came about to the figures as claimed. Therefore the defendant's contention that the plaintiff had not suffered any loss or damage is baseless and devoid of merit.

[34] Consequently, the learned judge struck off the defendant's counterclaim. At the end of the day he ruled that the defendant had not been able to raise any triable issue and granted the orders prayed for by the plaintiff in the summary judgment application.

JUDGMENT OF THIS COURT

[35] Summary judgment procedure is a procedural device available for prompt and expeditious disposition of an action by a plaintiff or a counterclaim by a defendant, without a trial when there is no dispute as to the fact and law. In *Ng Hee Thoong & Anor v Public Bank Bhd* [1995] 1 MLJ 281; [1995] 1 AMR 622, Gopal Sri Ram JCA (as he was then) observed as follows:

> The effect of O 14 is to shut the defendant from having his day in the witness box. It is a very special jurisdiction and is only to be invoked in cases where there is no bona fide triable issues. On occasion like this it is necessary to recall to mind the words of judges more learned than I upon the subject at hand.

[36] As to what are capable of being triable issues, Mohamed Dzaiddin J (as he then was) in *Syarikat Kerjasama Serbaguna Tunas Muda Sungai Ara v Ghazali bin Ibrahim* [1985] 2 MLJ 225 observed as follows:

> The issue here is whether or not there is a triable defence. This simply means that it is for the defendant to show on merits, he has a good defence to the claim, or that a difficult point of law is involved, or the dispute is as to the fact which is to be tried or any other circumstances showing reasonable ground of a bona fide defence.

[37] The main issues raised by the defendant in the instant appeal were with regards to the illegality of the said foreign exchange contracts, estoppel and that the plaintiff did not suffer any damages.

[38] It was only on the issue with regards to estoppel that we were of the unanimous view that this is not a suitable case for summary judgment to be entered. We dare say that the triability of this issue depends upon evidence as opposed to law. In *Bank Negara Malaysia v Mohd Ismail & Ors* [1992] 1 MLJ 400, in his dissenting judgment, Gunn Chit Tuan SCJ (as he then was) said (at p 414):

> The scope of O 14 proceedings meant for cases which are virtually uncontested or imcontestable is now determined by the Rules of the High Court 1980. Generally where a defendant shows that he has a fair case for defence, or reasonable grounds for setting up a defence, or even a fair probability that he has a bona fide defence, he ought to have leave to defend. O 14 is not intended to shut out a defendant.

The jurisdiction should only be exercised in very clear cases (*Malayan Insurance (M) Sdn Bhd v Asia Hotel Sdn Bhd* [1987] 2 MLJ 183; *Gunung Bayu Sdn Bhd v Syarikat Pembinaan Perlis Sdn Bhd* [1987] 2 MLJ 332). It was held in the well-known House of Lords' case of *Jacobs v Booth's Distillery Co* (1901) 85 LT 262 that a complete defence need not be shown. The defence need only show that there is a triable issue or question or that for some other reason there ought to be a trial, and leave to defend ought to be given. In fact, even though the defence is not clearly established, but only reasonable probability of there being a real defence, leave to defend should be given (*Manger v Cash* (1889) 5 TLR 271).

[39] In the instant appeal it is the plaintiff's case that it had the overriding right to close out any or all foreign exchange contracts outstanding at any time and without further reference to the defendant and to demand settlement of the balance due. We do not think that this point can be seriously disputed following the terms of the letters of offer. Before going into the circumstances surrounding the defence of estoppel, we asked ourselves as to what actually is a forward foreign exchange contract. The answer to this question was illustrated at length in *United Overseas Bank (M) Bhd v Island Palm Trader Sdn Bhd* [2000] MLJU 659; [2000] 8 CLJ 647, a case which dealt with a winding up petition. In his judgment, the trial judge, Abdul Malik Ishak J (as he then was) said (at pp 674–676 (CLJ)):

Basically, the respondent entered the 'forward foreign exchange contracts' with the petitioner for the purpose of obtaining cover against the risk of a change in the rate of exchange applicable to a foreign currency transaction that is supposed to take place in the near future. Whether one describes this sort of contract as 'forward foreign exchange contracts' or as 'currency hedge contracts' is immaterial or is of no consequence. They both carry with it commercial value of great magnitude. It was held by the English Court of Appeal in the case of *Wilson, Smithett and Cope Ltd v Terruzzi* [1976] 2 WLR 418 that an exchange contract refers to and is related to a contract where the currency of one country is exchanged for that of another.

A 'forward foreign exchange contract' involves the exchange of two currencies which is to take place in the near future. In such a situation, by virtue of the contract the bank is described as agreeing to buy or to sell foreign currency at an agreed rate of exchange. This brings into sharp focus two important terminologies. The first would be the 'forward selling contract' wherein the bank would agree to deliver to its customer a certain sum of money of a specified foreign currency on a specified fixed date, or during a certain schedule of time, and that sum of money would be at the rate of exchange fixed by the parties at the time the contract is made. An example would be where a New Zealander importer of goods priced in United States dollars desires to fix the amount of the New Zealand currency that will have to be paid. The delivery date of the contract would be scheduled at or approximately at the time the payment becomes due. It is here that the customer's obligation is simply to take the foreign currency and to pay the bank the New Zealand currency equivalent at the time of taking. The second important terminology to consider would be a 'forward buying contract' which essentially means that the bank agrees to buy a specified sum of money in a particular

currency for delivery on a fixed date or at a scheduled period of time and at an exchange rate fixed by the parties at the point of time when the agreement is entered.

In a book entitled *Commercial Bank Management: Functions and Objectives,* (3rd Ed) by RD De Lucia and J Peters, a 1993 publication, the learned authors at p 176 of the book under category of 'Forward Foreign Exchange Markets' succinctly said:

> Often, the underlying physical position a price taker wishes to hedge is known well in advance of the need to deliver the foreign currency. Of course, the price taker would convert into the foreign currency immediately (referred to as a 'spot' transaction) then invest the foreign currency until it is required. However, individual price takers cannot achieve this aim as efficiently as banks because banks can obtain economies of scale through aggregating individual requirements.
>
> Accordingly, banks/market makers not only quote buy/sell prices for spot transactions but also provide prices on forward delivery of a currency. In pricing this forward quote, price makers employ the covered interest parity theorem which states that the difference between domestic and overseas interest rates is reflected in the cost of forward cover.

At p 178 of the same book, the learned authors continued to say in the context of 'credit exposure in dealing with foreign exchange':

> As a foreign exchange transaction, by its very nature, is an exchange of two currencies and where the domicile of the currencies are in different time zones, a significant credit risk arises at settlement. Until settlement, the risk is only the cost of a change in market prices which should represent only a small proportion of the face value of the transaction. However, the bank is exposed to the full face value at settlement, ie, a bank may pay one currency in its time zone and never receive the other currency because the counterparty has defaulted in a latter time zone. Such defaults have occurred where settlements made in Asian time zones have been defaulted upon by a subsequent collapse of a bank. Of course, this risk, while not amplified by amount, is increased with forward contracts as the counterparty's credit standing may deteriorate in this period.
>
> For these reasons, it is appropriate to establish a series of credit controls to ensure the bank is not overly exposed to either the replacement or settlement risk from dealing with foreign exchange counterparties.

In my considered view, 'forward foreign exchange contracts' are here to stay and it would be governed by the ordinary rules of contract law. There must be reciprocal promises on the part of the bank while the customer will furnish the necessary valuable consideration thereto. In the context of the present case, there was in existence a legally valid and binding 'forward foreign exchange contracts', and when the respondent cancelled the forex contracts, the respondent must be held accountable to it. The petitioner sustained foreign exchange losses when the respondent cancelled the forex contracts. A debt is due and subsisting and the respondent being insolvent was unable to pay that debt. The best solution would be to wind up the respondent.

[40] The defence of estoppel in the instant appeal revolves around the plaintiff's letter dated 15 July 1998 wherein the plaintiff agreed to give to the defendant a further six months extension to the said foreign exchange contracts on condition of a corporate guarantee being given by Mycom Bhd for RM1.9m to the plaintiff within one month from the date of that letter. Thus the defendant was given until 16 August 1998 to furnish the said corporate guarantee failing which the plaintiff would exercise its overriding right of repayment on demand and to cancel the said foreign exchange contracts. However, the plaintiff cancelled the said foreign exchange contracts on 23 July 1998 although the defendant had until 16 August 1998 to provide the said corporate guarantee.

[41] Learned counsel for the defendant argued that the plaintiff is estopped from terminating the said foreign exchange contracts. Counsel contended vide the said letter dated 15 July 1988 the plaintiff had waived its strict right by giving extension to the said foreign exchange contracts and would not be cancelling the contracts if the corporate guarantee from Mycom Bhd was furnished on or before 16 August 1998.

[42] The non-production of the said corporate guarantee was highly in dispute by the parties. In its affidavits, the plaintiff contended that the defendant had informed the plaintiff that it could not comply with the plaintiff's condition to provide the said corporate guarantee but this was denied by the defendant. It seems that at a meeting between the parties, one Yong Su Ling @ Yong Su Leng, an accountant who is an employee of the defendant stated that she informed the plaintiff that it would only be difficult to obtain an immediate decision from Mycom Bhd but she contended that she never informed the plaintiff that it will not or could not provide the said corporate guarantee.

[43] The doctrine of estoppel was dealt at length by the Federal Court in *Boustead Trading (1985) Sdn Bhd v Arab-Malaysian Merchant Bank Bhd* [1995] 3 MLJ 331; [1995] 4 CLJ 283 where Gopal Sri Ram JCA (as he then was) said (at pp 345 and 347 (MLJ) and pp 295 and 297 (CLJ)):

> The width of the doctrine has been summed up by Lord Denning in the *Amalgamated Investment* case (at p 122) (*Amalgamated Investment & Property Co Ltd v Texas Commerce International Bank Ltd* [1982] QB 84) as follows:
>
> > The doctrine of estoppel is one of the most flexible and useful in the armoury of the law. But it has become overloaded with cases. That is why I have not gone through them all in this judgment. It has evolved during the last 150 years in a sequence of separate developments: proprietary estoppel, estoppel by representation of fact, estoppel by acquiescence, and promissory estoppel. At the same time it has been sought to be limited by a series of maxims: estoppel is only a rule of evidence, estoppel cannot give rise to a cause of action, estoppel cannot

A do away with the need for consideration, and so forth. All these can now be seen to merge into one general principle shorn of limitations. *When the parties to a transaction proceed on the basis of an underlying assumption either of fact or of law — whether due to misrepresentation or mistake makes no difference — on which they have conducted the dealings between them — neither of them will be allowed* B *to go back on that assumption when it would be unfair or unjust to allow him to do so. If one of them does seek to go back on it, the courts will give the other such remedy as the equity of the case demands.*

(Emphasis added.)

C Lord Denning in *WJ Alan & Co Ltd v El Nasr Export & Import Co* [1972] 2 QB 189 said:

If one party by his conduct, leads another to believe that the strict rights arising under the contract will not be insisted upon, intending that the other should act D on that belief, and he does act on it, then the first party will not afterwards be allowed to insist on strict legal rights when it would be inequitable for him to do so.

E **[44]** In the instant appeal, we were of the view that whether the plaintiff had the right to cancel the said foreign exchange contracts prior to 16 August 1998 is a triable issue. Would it be inequitable having regard to the arrangement which had taken place between the parties under the circumstances discussed above? Premised upon conflicting affidavit evidence F we were of the view that this was not an appropriate case to be resolved by way of summary judgment. As such, we allowed the appeal by the defendant and ordered that the matter go for trial.

Appeal allowed with costs.

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Reported by Kanesh Sundrum

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